80-940

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LONE STAR STEEL COMPANY AND
UNITED MINE WORKERS OF AMERICA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LONE STAR STEEL COMPANY AND
UNITED MINE WORKERS OF AMERICA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Whether the Board properly concluded that a contract clause extending the collective bargaining agreement between the company and the union to mines subsequently acquired by the company, if the union is recognized or certified as the bargaining representative of the employees at those mines, is a mandatory subject of bargaining.

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. This petition is conditioned either on the granting of the petition for a writ of certiorari filed by respondent Lone Star Steel Company in No. 80-716, which seeks review of the same judgment, or the granting of Question 2 of the petition for a writ of certiorari filed by the United Mine Workers of America, Local 1854, in No. 80-289, which seeks review of the judgment in *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d Cir. 1980). The Board is filing briefs in response to both of those petitions. In the event that No. 80-716 and Question 2 of No. 80-289 are denied, the Board requests the Court to deny this petition as well.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29)[1] is not yet reported. The Board's decision and order (Pet. App. C1-C20) are reported at 231 N.L.R.B. 573.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, provide:

> Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collec-

---

[1] "Pet. App." references are to the appendix to the petition in No. 80-716, in which the Company is seeking review of another part of the court of appeals' decision.

> tively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:
> * * *

STATEMENT

The Board found that the United Mine Workers of America ("the Union"), the representative of the employees of Lone Star Steel Company ("the Company") at its Starlight mine, called a strike because of the Company's refusal to agree to several provisions in the national contract between the Union and the Bituminous Coal Operators' Association. Among the clauses in dispute was the "application of contract" clause, which read (Pet. App. E5):

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use.

An addendum made clear that this clause would extend the contract only to facilities where the Union was recognized or certified as the employees' bargaining representative (Pet. App. C6).

Upon charges filed by the Company, the Board's General Counsel issued a complaint alleging, *inter alia*, that the "application of contract" clause was not a mandatory subject of bargaining, and that the Union therefore violated Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3), by striking

with regard to that clause. A divided Board held that the "application of contract" clause was a mandatory subject of bargaining because it "serves to protect the jobs and work mine by removing economic incentives which might otherwise encourage Lone Star to transfer such work to other mines under [the Company's] control" (Pet. App. C11). Accordingly, the Board concluded that the Union did not violate the Act by striking over this clause, and dismissed the complaint in this respect (Pet. App. C12).[2].

The court of appeals rejected the Board's view, holding that the "application of contract" clause was not a mandatory subject of bargaining, and that the Union's strike regarding the clause therefore violated Section 8(b)(3) of the Act (Pet. App. A23-A28). In the court's view, the clause was broader than necessary to protect unit employees against a shift of production to another mine with lower wages and inferior working conditions. The court observed that the clause would extend the agreement to coal preparation or production facilities to which unit work could not be transferred, and would require that all contract provisions, including non-economic provisions having no bearing on the employees' working conditions, be put into effect at those facilities (*id.* at A28). Accordingly, the court set aside the Board's order with respect to the "application of contract" clause and remanded the case for entry of an appropriate remedial order (*ibid.*).

REASONS FOR GRANTING THE PETITION

The question whether the "application of contract" clause is a mandatory subject of bargaining is also presented as Question 2 of the petition for a writ of certiorari in *United*

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[2]The Board also found that the Union did not violate the Act in striking for a "successorship" clause (Pet. App. C6-C10). The court of appeals sustained the Board's findings in this regard (Pet. App. A8-A23), and the Company has filed a petition for certiorari to review that ruling. *Lone Star Steel Company* v. *NLRB, et al.*, No. 80-716. The Board intends to file an opposition to that petition.

Mine Workers of America, Local 1854 v. *NLRB*, No. 80-289, which seeks review of the judgment in *Amax Coal Co.* v. *NLRB*, 614 F. 2d 872 (3d Cir. 1980). In that case, the Third Circuit, like the court of appeals in this case, held that the identical "application of contract" clause is not a mandatory subject of bargaining. 614 F. 2d at 883-884. For the reasons explained in our brief in response to the petition in No. 80-289, the Board does not oppose certiorari on this issue, and it has filed this petition to preserve its position on the "application of contract" clause question in this case.[3] Accordingly, if the Court decides to review the "application of contract" clause issue in No. 80-289, the Court should dispose of this petition in light of its determination in No. 80-289.

In addition , if the Court decides to grant the Company's petition on the "successorship" clause question (No. 80-716), the Board believes that it would be appropriate to review the related "application of contract" clause question as well. It is settled that matters affecting individuals outside the bargaining unit are mandatory subjects of bargaining if they "vitally affect" the terms and conditions of employment of unit employees. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176, 178-179 (1971). The "application of contract" clause meets this test: it protects the unit employees' jobs, wages, and working conditions by ensuring that labor costs will be the same at any mine where the employees are represented by the Union. If labor costs were lower at another mine, because the employees there received lower pay or fewer fringe benefits, the Company might well transfer unit work there, thus depriving unit employees of their jobs. The "application of contract"

---

[3]In *Amax Coal*, the Board has filed its own petition for a writ of certiorari with respect to whether the management-appointed trustee of a jointly administered trust fund is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Laobr Relations Act, 29 U.S.C. 158(b)(1)(B). *NLRB* v. *Amax Coal Company*, No. 80-692.

clause seeks to protect the unit employees against such erosion of their working conditions. Contrary to the view of the court of appeals, the fact that the clause provides for extension of the non-economic, as well as the economic, provisions of the contract to both the Company's mining and non-mining facilities does not impair its status as a mandatory subject of bargaining. Moreover, because the contract becomes applicable at another facility only if the employees at that facility have first selected the Union as their representative, the Board correctly observed that the "application of contract" clause does not seek unlawfully "to promote the Union's institutional or organizational interests" (Pet. App. C12).

CONCLUSION

The petition for a writ of certiorari should be granted if the Company's petition in No. 80-716 is granted. If the petition in No. 80-716 is denied but the petition in No. 80-289 is granted as to Question 2, the Court should defer disposition of this petition pending its decision in No. 80-289.

Respectfully submitted.

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DECEMBER 1980

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Lone Star Steel Company, Petitioner,	)	
v.	)	No. 77-1667
National Labor Relations Board, Respondent,	)	
and	)	
United Mine Workers of America, Intervenors.	)	

JUDGMENT

Before: HOLLOWAY and BARRETT, Circuit Judges, and MILLER, Judge*

THIS CAUSE came on to be heard upon a petition filed by Lone Star Steel Company, to review an order of the National Labor Relations Board which dismissed the complaint against United Mine Workers of America, on August 24, 1977. The Court heard argument of respective counsel on March 12, 1979, and has considered the briefs and transcript of record filed in this cause. On July 28, 1980, the Court, being fully advised in the premises, issued its opinion sustaining in part and setting aside in part the order of the Board dismissing the complaint and remanding the case to the Board for further proceedings, all in accordance with the Court's opinion.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Tenth Circuit that this case be and it hereby is remanded to the Board for further proceedings, in accordance with the Court's opinion.

_____

Judge, United States Court of Appeals for the Tenth Circuit

Dated: September 12, 1980

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*Honorable Jack Richard Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

No. 80-940

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

LONE STAR STEEL COMPANY

and

UNITED MINE WORKERS OF AMERICA

BRIEF IN OPPOSITION TO A CROSS-PETITION FOR CERTIORARI IN 80-940

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UNITED MINE WORKERS OF AMERICA'S RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent, United Mine Workers of America, hereinafter referred to as the "Union," files this brief in support of the Cross-Petition for a Writ of Certiorari filed in this cause by the National Labor Relations Board, hereinafter referred to as the "Board." Respondent, Lone Star Steel Company, will hereinafter be referred to as "Lone Star."

STATEMENT OF THE CASE

The Board asks for review, under certain circumstances, of the ruling of the United States Court of Appeals for the Tenth Circuit concerning the "Application of Contract" clause contained in the 1974 contract between the Union and the Bituminous Coal Operators' Association. Lone Star was not a signatory to this instrument and consequently negotiations were held directly between Lone Star and the Union. When agreement could not be reached, the Union members struck the Lone Star coal mining facility known as the Pocahontas Mine near McAlester, Oklahoma.

Of the several unfair labor practice complaints which arose out of this dispute, one centered around the propriety of the Union calling the strike to enforce the application of a contract clause. An Administrative Law Judge found the clause not to be a mandatory subject of bargaining and therefore found that the Union committed an unfair labor practice by calling a strike to enforce this clause. The Board, on review, found the clause to be a mandatory subject of bargaining and finally the Tenth Circuit, agreeing with the Administrative Law Judge, found the Application of Contract Clause not to be a mandatory subject of bargaining. In supporting the Board's Cross-Petition to review this ruling the Union would urge that in making its decision the Tenth Circuit misapplied the previous case law and overstepped its scope of review.

REASONS FOR GRANTING THE WRIT

In finding that the application of contract clause was not a mandatory subject of bargaining, the Court held that the clause did not properly preserve the two-pronged requirements of *Local 24, International Teamsters, etc., v. Oliver,* 79 S.Ct. 297 (1959) which was established by this Court. The finding in *Oliver* was that in order for a subject involving employees outside the bargaining unit to be considered mandatory it must vitally affect the terms and conditions of employment or the job security of the unit employees and must represent a direct frontal attack on the problem threatening such interests. The Tenth Circuit found that the automatic application of this entire collective bargaining agreement, including its non-economic provisions, to other appropriate units employed at other facilities operated by Lone Star did not represent the kind of direct frontal attack on the problem demanded by *Oliver.*

Oliver involved a clause in a collective bargaining agreement which set rental payments for owners of trucks who leased their trucks to the companies and then were hired by the companies to drive those trucks. It was the Union's position that the companies were paying inadequate rentals to these owner-operators with the result that part of the owner-operator's wages were being used for the upkeep of the vehicles. The evil which the Union sought to curtail was the possibility that the carriers would make

rental payments and wage payments to the owner-operators which, when considering the fact that the rental payments were not themselves enough to pay for the upkeep of the trucks, were less than the wages being paid to the drivers who did not lease trucks to the carriers. The Union reasoned that in these circumstances the company would be willing to cut back on its policy of owning its own trucks and the hiring of Union drivers to operate them and turn increasingly to the use of owner-operators. This would, of course, threaten the job security of the Union truck drivers.

The Union's response to this threat, which this Court characterized as "a direct frontal attack," was a clause in the contract with the carriers which required the carriers to pay the owner-operators a rental for their trucks which at least equalled the cost of operating that truck thereby guaranteeing the same wage to owner-operators and drivers. This Court found the clause to be a mandatory subject of bargaining.

In the case at bar the Tenth Circuit recognized that the application of contract clause "vitally affected" the wages and working conditions of the unit employees involved. The record reflects that the clause was inserted in order to avoid the possibility of Lone Star operating another coal mining operation, hiring non-United Mine Workers of America workers at a lower wage and with fewer fringe benefits than were enjoyed by the Union

miners and then Lone Star shifting its operations to the new facility which could be operated at a substantially lower cost. This would be especially likely in a situation such as faces the party in the case at bar since Lone Star mined coal only for its own needs and not for a general market. Therefore, a mine producing coal cheaper than the mine in question would be a lure impossible for Lone Star to pass up.

The question then became whether the application of contract clause is a "direct frontal attack" on the problem. In *Oliver* the "direct frontal attack" was the imposition of a clause which preserved wages by insuring a certain level of retal charges. In the case at bar, wages are insured by, under certain instances, applying the same wage standards at other mining operations. The results sought by those clauses are identical, a guarantee of a certain wage. The means to that end are the same, guaranteeing a certain wage level by putting a burden on potentially cheaper methods of getting the same work done. In *Oliver* the company was required to pay certain compensation to owner-operators who performed for the company the same service, the driving of trucks, as did the Union members with the possible effect of costing the Union members their jobs. In the case at bar the company would be required to pay the same compensation to other miners who performed the same job as the Union members to this contract. The Union fails to see how one method is any

more or less a "direct frontal attack" of a problem than the other. Both seek to guarantee wages by making it impossible for potential competitors in the labor force to do the same job for lower wages.

Neither the Tenth Circuit nor Lone Star have pointed out, with precision, how the clause failed to meet the "direct frontal attack" test. They both simply state that conclusion. The objection which everyone seems to have to this clause is that it is "too broad." Even assuming that the clause has a wide ranging effect, this does not, in and of itself, make the clause illegal. In addition, the Union would argue that the finding of the Tenth Circuit, that the clause is too broad, is not a proper function of the Tenth Circuit's scope of review.

By finding the application of contract clause to be too broad the Court has improperly inserted itself into the negotiation process. The design behind the National Labor Relations Act and the National Labor Relations Board created thereby is to give management and labor an independent, but outside, referee whose purpose is to establish the rules by which management and labor reach contractual agreements. While the referee is to govern the rules of the negotiation and determine any violations thereof and the punishment therefore, the referee whould not participate in the negotiations themselves nor can it show favoritism to either party of the negotiation. If, in the opinion of the Board or the Court, one side of a labor

dispute is getting the better of the negotiations and is doing so by means which are within the provisions of the National Labor Relations Act neither the Board nor the Court can take any steps to correct what they might perceive to be an inequity. Such an intrusion would clearly be outside the scope of their authority. By finding the application of contract clause too broad the Court has commented not on its legality but on its quality. The Tenth Circuit seemed to be concerned that such a clause would put too heavy a burden on Lone Star.

However, the clause should be struck down only if it is illegal. No specific finding of illegality has been made by anyone who has heard this action. The only complaint that has been made about the clause is that is is too broad. The narrowing of the scope of a legal clause should be left to the negotiations of the parties involved. This would be a proper subject for negotiation. If Lone Star feels that the clause is too broad and would be an unfair burden on it, it easily could have proposed a similar clause with a narrower scope. It is this method of proposal and counter proposal that is the backbone of the country's national labor policy. The character of these negotiations should not be dictated to the parties by the Courts. The finding by the Tenth Circuit in this case that the application of contract clause was too broad is an unwarranted attempt by the Court to control the negotiations of the parties.

There is not dispute that the clause deals with the sub-

ject which vitally affects the members of the bargaining units. In addition, it seems clear that the approach contemplated by the clause is no less a direct frontal attack on a problem than the clause which was approved by this Court in *Oliver*. By finding the clause to be "too broad" but not having any ground on which to find the clause illegal, the Tenth Circuit made an unwarranted intrusion into the negotiation process. It is up to Lone Star, not the Courts, to protect itself from a legal, but possibly burdensome, clause. Because the application of contract clause in the case at bar did indeed meet the requirements of this Court in *Oliver* it was error for the Tenth Circuit to find it illegal.

CONCLUSION

For the reasons outlined above Respondent United Mine Workers of America prays that the Cross-Petition of the National Labor Relations Board in this matter should be granted as prayed for in its Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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No. 80-940

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UNITED MINE WORKERS OF AMERICA'S RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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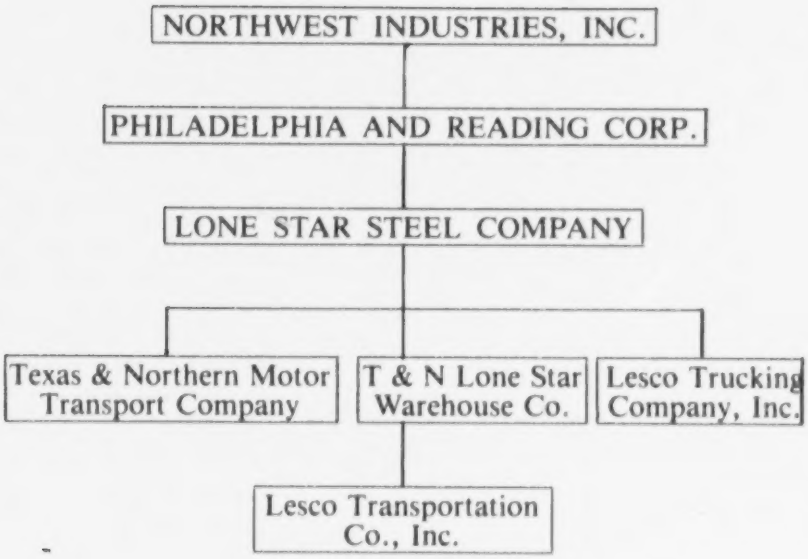
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BRIEF IN OPPOSITION TO A CROSS-PETITION FOR CERTIORARI IN 80-940

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED IN THE CROSS-PETITION IN CASE No. 80-940

Is proposed contract language that would require an employer to agree to extend the collective bargaining agreement, *in toto,* to any of its mines, coal lands, and facilities presently operated or thereafter acquired, or put into later operation by the employer, its subsidiaries, or affiliates at any time during the duration of the contract, a mandatory subject of bargaining within the meaning of 29 U.S.C. §158(d).

OPINIONS BELOW

The Circuit Court opinion may be found at _____ F.2d _____, (Pet. App. A1-A29).[1] The NLRB decision modifying an Administrative Law Judge ruling is reported at 231 NLRB 573, (respectively, Pet. App. C1-C20 and D1-D26).

JURISDICTION

The Court of Appeals denied a timely Petition for Rehearing on September 5, 1980. (Pet. App. B1)[2] Judgment was entered on September 12, 1980. (Cr. Pet. App. 1a)[3] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COUNTER-STATEMENT OF THE CASE

A. The Facts

Lone Star Steel is a Texas-based steel producer. It uses 36,000 to 40,000 tons of coal a month to make coke for its furnaces. Lone Star acquires its coal in three ways: by purchase; by mining its own leases; and by occasionally letting contracts to mining contractors.

In 1973, Lone Star assumed direct operation of one of its mines near McCurtain, Oklahoma from an independent contractor, and assumed part of the UMWA collective bargaining contract.

Lone Star and other independent operators[4] were notified that their contract would expire November 12, 1974. A nation-

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[1] "Pet. App." refers to the Appendix in Petition No. 80-716, in which Lone Star is seeking review of another part of the Court of Appeals decision.

[2] The decision and order of the Court of Appeals was entered on July 28, 1980. (Pet. App. A1-A29)

[3] The Cross-Petition in Case No. 80-940, referred to as "Cr. Pet. App." or "Cr. Pet. p._____."

[4] Lone Star was not a member of BCOA's multiemployer bargaining group.

wide strike began Midnight November 12, 1974, and as concerns Lone Star's McCurtain mine has continued except for one 60-day "truce" period from January through March 1975.

Among the various contract provisions giving rise to the instant case were the following:

> The enabling language (the second paragraph of which contains the "successor clause") found at Article I of the Agreement. (Pet. App. E1)
>
> > THIS AGREEMENT made this _____ day of _____, 19_____, between the operators and associations signatory hereto, as parties of the first part (each coal operator which is a signatory hereto being called "Employer") and the International Union, United Mine Workers of America (hereinafter called "Union"), on behalf of each member thereof, as party of the second part, covers all of the bituminous coal mines owned or operated by said first parties. This Agreement carries forward and preserves the terms and conditions of all the various District agreements executed between the United Mine Workers of America and the various operators and coal associations subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.
> >
> > This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. Provided

> that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

The application of contract clause (called the "coal lands" clause) found in Article II, Section (f) (Pet. App. E5) reads:

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing, and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during this term which may hereafter (during the term of this Agreement) be put into production or use.

This clause was modified to require that it becomes effective *only* if the union first becomes the representative of employees at other locations.

The Company viewed these clauses with alarm. In conjunction with the remainder of Articles I and II, which define the scope and coverage of the contract, it believed the clauses bound assets and operations outside the immediate bargaining unit to the terms of the contract, and would allow the union to prohibit sales, leases, and a variety of business relationships unless a neutral purchaser or lessee agreed to assume the entire UMWA agreement. The Company wanted the right to sell or enter long term mining contracts elsewhere, if needed, and sought to have the contract apply *only* to the McCurtain mine.

In March of 1975, Petitioner filed Unfair Labor Practice Charges against the UMWA alleging, among other things, that

the "coal lands" clause was a non-mandatory subject of bargaining; therefore, the UMWA's strike to obtain the clause violated §8(b)(3) of the Act. Complaint issued and a hearing was held before an Administrative Law Judge. His decision was appealed to the NLRB, which rendered its decision. The Tenth Circuit partially reversed the NLRB. It found that the "coal lands" clause was a permissive subject of bargaining. It upheld the NLRB determination that the successorship clause did not violate §8(e), and was a mandatory subject of bargaining. (Pet. App. A28)

B. The Rulings Below

The Company generally agrees with the NLRB's rendition of the rulings below on the "coal lands" clause.

BRIEF IN OPPOSITION TO CROSS-PETITION No. 80-940

The question of whether the "application of contract" clause is within the "vitally affects" test is also before this Court as Question #2 in *Amax Coal Co. v. NLRB,* 614 F.2d 872 (1980) reversing in part 238 NRLB 214, petitions for cert. pending, Nos. 80-289 and 80-692. The NLRB suggests that if certiorari is granted there, this case should be deferred to that result. It further suggests that if Lone Star's Petition in No. 80-716, regarding the "successorship" issue is granted, then its Cross-Petition here should also be granted. The nub of the NLRB's "conditional" claim for review in these cases is that the "vitally affects" test of §8(d) may be met and passed regardless of whether non-economic provisions are carried along as a secondary consequence of a clause being measured against §8(d).

Lone Star suggests that review of this issue as regards the "coal lands" clause is unwarranted, and the attempt to tie its review to the "successor" question in No. 80-716 is demonstrative only of the sharp departure of that ruling from the prevailing precedent. While the issue in both questions turns on the two-pronged test found in *Teamsters Union v. Oliver,* 358 U.S. 283 (1959), only the successor decision departs from the existing precedent.

The court in *Amax, supra,* correctly and succinctly applied the stringent two-pronged test of *Oliver, supra.* So too, the Tenth Circuit in its "coal lands" decision observed that the broad brush language in the UMWA contract was not a "direct frontal attack" thus the two-pronged requirement was failed.

Of the foregoing §8(d) decisions seeking review, all are consistent except the Tenth Circuit's ruling on the "successorship clause".[5] Despite this, the NLRB has here suggested that the issues in Cases 80-716 and 80-940 are "appropriate" for review *together* because the mere fact that a clause extends a collective bargaining contract in its entirety to "extra unit" assets ". . . does not impair its status as a mandatory subject of bargaining." (Cr. Pet. p.5) The NLRB even suggests that this rule is "settled." (Cr. Pet. p.4) The fact is, the test suggested by the NLRB runs contrary to every precedent, *but for the Lone Star "successorship" ruling.*

The words of §8(d) are words of limitation. Here, the NLRB suggests that §8(d) is a door through which a union may

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[5] Lone Star has sought certiorari on the Tenth Circuit's successorship ruling in Case No. 80-716.

expand its representation and the contract's coverage by attaching itself and the contract to all employer assets regardless of extra unit consequences. This is not the rule, nor should it be allowed to become the rule.

In Justice Stewart's concurring opinion in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), he observed that the words of the statute, "wages, hours and other terms and conditions of employment," are words of limitation. He wrote:

> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, *though the effect of the decision may be necessary to terminate employment.* If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area. (Emphasis Added) (379 U.S. at 233)

CONCLUSION

Lone Star believes that the "vitally affects" exception to §8(d) must always meet *both* the requirements set forth in *Teamsters Union v. Oliver,* 358 U.S. 283 (1959), and that the attachment of an entire contract to all assets of an employer will invariably fail the test. The Court below followed *Oliver, id.,* and properly ruled that the "coal lands" clause was overbroad. The Petition should be denied.

Respectfully submitted,

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